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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Commission's) MM Docket No. 92-51
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

To: The Commission

COMMENTS OF MEDIA VENTURE PARTNERS

Media Venture Partners ("MVP") hereby submits its comments in the above-referenced proceeding. More specifically, MVP proposes that the Commission authorize security interests in the rights which a licensee has in the license for a broadcast station. If the Commission should decide not to authorize such security interests for legal or policy reasons, then, in that event, MVP proposes that the Commission at least make it clear that the prohibition against security interests does not preclude a security interest in the proceeds of the sale of a station.

Media Venture Partners

MVP is an investment brokerage firm specializing in the broadcast industry. The firm handles mergers and acquisitions, appraisals, and financing through offices in Washington, D.C., Orlando and San Francisco. The four MVP principals have completed more than \$550 million in transactions and have appraised broadcast properties worth more

than a billion dollars. According to Paul Kagan's Broadcast Banker-Broker, MVP handled more radio transactions (worth approximately \$62 million) than any other brokerage firm in the country in 1991.

Introduction

As the Commission's Notice of Proposed Rulemaking and Notice of Inquiry ("Notice") acknowledges, the broadcast industry -- and especially the nation's radio stations -- are in trouble. Highly leveraged transactions in the 1980s, coupled with the general downturn in the economy, have made the financial burdens of broadcast ownership difficult for most and intolerable for many.

The financial difficulties of broadcast ownership are compounded by the Commission's refusal to allow any kind of security interests associated with a broadcast license.¹ There is virtually no bank financing available for broadcast acquisitions, and financing from other sources is available only on a limited scale. Many factors explain this limited financing, but one factor looms particularly large: the lender's inability to obtain adequate security for its loan. The lender is not only precluded from having any security

¹ As used in these comments, the term "security interest" includes not only the security interest of a third party creditor (such as a bank) but also the right of reversion specified in Section 73.1150 of the Commission's rules.

interest in the license itself; the lender is also prohibited from having any security interest in the licensee's rights, and some bankruptcy courts have even held that a lender is prohibited from having a security interest in the proceeds of the sale of any station. Faced with these prohibitions and uncertainties, and having learned a bitter lesson from highly leveraged transactions in the past, many banks and other financing sources have decided to avoid any involvement with the broadcast industry.

The lender's concern with adequate security can be easily alleviated. To be sure, the Communications Act of 1934 does prohibit private ownership of broadcast licenses. But the law does not prohibit a security interest in a licensee's rights any more than the law prohibits a licensee from granting an option to a third party to acquire whatever rights the licensee has. Therefore, the Commission can and should issue a policy statement which would (1) authorize security interests in the licensee's rights (as opposed to the license itself) and (2) at a minimum, authorize security interests in the proceeds of any station sale. That policy statement would go a long way toward restoring the financial health of the broadcast industry.

I. Statute Does Not Prohibit Security Interests

The Notice raises a question whether the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq. (the "Act"), prohibits "a limited security interest or a reversionary interest in an FCC broadcast license." Notice at ¶18. Before answering that question, it is critical to specify the precise parameters of the security interest at issue here.

The security interest should not and need not include any ownership interest in a broadcast license. Nor should the security interest confer any right in the secured party to acquire a broadcast license or control a broadcast license without first securing FCC approval. The security interest would merely entitle the secured party to have the licensee's rights assigned or transferred to the secured party if -- and only if -- the Commission gives its prior approval.

There is no statutory bar to the limited security interest proposed by MVP. The starting point of the analysis is the Act's recognition that a broadcast license vests the licensee -- a private party -- with certain rights. E.g. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940) (Act designed for "the protection of private as well as public interest"). Thus, Section 301 of

the Act states that "no such [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. §301 (emphasis added). Section 309(h)(2) further provides that the station license "shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." 47 U.S.C. §309(h)(2) (emphasis added).

The rights accorded by the foregoing statutory provisions are limited. But they constitute a private interest which has value in the marketplace. As one court observed,

. . . That private as well as public interests are recognized by the Act is not to be doubted. While a station license does not under the Act confer an unlimited or indefeasible property right -- the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest -- nevertheless the right under a license for a definite term to conduct a broadcasting business requiring -- as it does -- substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. . .

L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948). In other words, the Act acknowledges (through

Sections 309, 310, 312, and 316) that the licensee can preserve, protect, and -- subject to prior FCC review -- dispose of whatever rights the licensee holds. Nothing in the Act precludes the licensee from granting a security interest in those rights.

The private interest of the licensee in a broadcast license is confirmed by the United States Tax Court's decision in Jefferson-Pilot Corporation v. Commissioner of Internal Revenue, 92 TNT 80-17 (April 14, 1992). In that case the court held that Jefferson-Pilot Corporation ("JPC") could allocate a certain portion of the acquisition price for three radio stations to the FCC licenses and then deduct that portion of the purchase price from its taxes. In other words, the court acknowledged that a FCC broadcast license by itself has a recognized value in the marketplace.

In reaching its conclusion, the tax court first had to decide that an FCC license is a "franchise" under the Internal Revenue Code. The court rejected the IRS Commissioner's argument that the relevant Code provision was confined to private franchises like "Dairy Queen" and that no value could be assigned to the FCC license because the licensee "obtains no property interest in the license." As the court explained, "An FCC license 'is not a full-fledged, indefeasible property interest. But neither is it a non-

protected interest, defeasible at will.' . . . A broadcast license confers a property right on its owner, although a limited and defeasible one." 92 TNT 80-17 at 10. The court further found that the licensee's limited property interest was subject to the FCC's "power to disapprove license assignments" and "to prescribe the standards of quality of services furnished and of the equipment used to promote such service. . ." Id. at 12.

To recognize the FCC's supervisory powers did not require the court to ignore the value which the marketplace accorded to the licensee's rights. As the tax court explained, "The simple fact is that an FCC license represents a limited right to engage in the business of broadcasting that can be valued separate from goodwill." Id. at 15.

If a private party's interest in a broadcast license is an asset which can be valued and deducted from the party's income taxes, then those rights can be subject to a security interest. This conclusion does not conflict with the Act's prohibition of private ownership of broadcast licenses. A security interest does not purport to give the holder any property right in the license itself. The security interest, in effect, constitutes the licensee's decision to assign the license to the secured party -- subject to prior FCC approval -- if and when the conditions for the exercise

of the security interest materialize. Hence, a creditor's or seller's possession of a security interest would not usurp the Commission's right to determine whether it should approve any assignment pursuant to a foreclosure on a security interest any more than the existence of an option usurps the Commission's authority to approve the option holder's right to exercise the option. In each case, an appropriate form (presumably a Form 314) must be filed, placed on public notice, and subjected to normal processing standards.

Since a grant of a security interest is compatible with the strictures of the Act, the Commission should authorize security interests in a licensee's rights (rather than in the license itself). If the Commission should decide -- for whatever reason -- not to authorize the issuance of such security interests, then the Commission should at least make it clear that the prohibition on security interests in the licensee's rights does not preclude the grant of a security interest in the proceeds of the sale of the station.

The need for this latter clarification cannot be overestimated. In a recent bankruptcy decision, a federal court determined that a bank could not have a security interest in the proceeds of the sale of a station because that would constitute "a lien on the licenses and that is not permitted

by the FCC." TAK Communications, Inc. v. New Bank of New England, No. 91-C-935-C (W.D. Wisc. March 23, 1992), Slip Op. at 24. Less than one month after the TAK Communications, Inc. decision was issued, another federal bankruptcy court held that "a creditor may perfect a security interest in a debtor's F.C.C. broadcasting license, limited to the extent of the licensee's proprietary rights in the license vis-a-via private third parties." In re: Ridgley Communications, Inc., Case No. 89-5-1705-JS (Chapter 11), 1992 Bankr. LEXIS 567, 572 (Bankr. D. Md. April 15, 1992).

The conflict in federal court decisions reflects a lack of guidance from the Commission. That uncertainty, in turn, discourages banks and other lenders from advancing monies for the acquisition of a broadcast license. The Commission should eliminate the uncertainty and, at a minimum, affirmatively state that a security interest can be acquired in the proceeds of the sale of a station.

II. The Public Interest Will Be Served By Security Interests

The Notice raised questions whether authorization of security interests would be in the public interest, assuming arguendo that such security interests are consistent with the Act. MVP's substantial experience with station sales and acquisitions -- including involvement in federal bank-

ruptcies and state receivership proceedings -- clearly indicates that the public interest would be well served by the authorization of security interests.

First, there is no doubt that the availability of security interests would increase the availability of financing for station sales. Banks and other lenders are always concerned about security for a loan. Current Commission policy, coupled with various bankruptcy court decisions, have undermined lenders' faith that any document granting a security interest -- however well perfected under state law -- is perfect. The lender therefore faces a substantial risk of being placed in a group with other unsecured creditors who have no priority of recovery in any default situation.

Second, there is no substantial likelihood that the existence of security interests will undermine the broadcaster's ability to secure credit from other parties, such as program suppliers. Security interests are a common feature of non-broadcast businesses (particularly where real estate is concerned), and the existence of security interests in other areas does not generally undermine the non-broadcast business's ability to secure credit from other suppliers. This is particularly so since the credit extended by those other parties usually does not even approach

the level of the loan necessary for an acquisition. In any event, other creditors can adopt other means to protect their respective interests (such as requiring advance payments or allowing for termination of business in the event bills remain unpaid for a certain period of time).

Third, the existence of security interests will probably not result in the secured party exercising control over station operations. A secured party will certainly be interested in a station's financial performance, and the station licensee will presumably be interested in avoiding any default that would result in a foreclosure on the security interest. But a secured lender would presumably know that any premature and unauthorized exercise of control over station operations would result in a Commission refusal to approve any assignment to the secured party -- thus destroying the value of the security interest. In short, the exercise of unauthorized control by a secured party would not be in the secured party's own self-interest.

Fourth, there does not appear to be any need for additional safeguards to preclude premature and unauthorized transfers of control to a secured party. As mentioned above, the secured party would presumably recognize that any premature exercise of control would undermine the value of its security interest. To the extent it deems it necessary,

however, the Commission could require that any assignment or transfer application to foreclose on a security interest include a certification by the assignee or transferee that it has not exercised any control over station programming, finances, or personnel (with the understanding that a false certification could result in a revocation of any grant and/or the imposition of a forfeiture).

Fifth, approval of security interests will probably have little or no impact on a lender's willingness to work with a financially-troubled station. Many lenders are no doubt currently fearful of pursuing any bankruptcy or receivership because of Commission policy. Even if security interests were authorized, however, a lender would still have an interest in developing a workout strategy, because a recalcitrant licensee could still frustrate the secured party's ability to obtain necessary Commission approval. To the extent a lender's hand is strengthened by the security interest, it must be remembered that a security interest only comes into play if the station has failed to abide by its obligations under the loan agreement. In short, the Commission should not frustrate the ability of most parties to secure loans because a few might prove to be bad financial risks.

Finally, Commission authorization of security interests may enhance the lender's position under existing contracts (which often permit security interests "to the extent authorized by the FCC") or perhaps result in a renegotiation of existing loan agreements. In either case, the lender will only be receiving what it would in any other business loan situation. If broadcasting is to regain its financial footing as a sound economic enterprise, those expectations must be honored. The public interest requires no less.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission authorize security interests in a licensee's rights in a broadcast license or, at a minimum, authorize security interests in the proceeds of the sale of a broadcast station.

Respectfully submitted,

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SUMMARY

Media Venture Partners ("MVP") is an investment brokerage firm specializing in the broadcasting industry. MVP handled more radio transactions in 1991 than any other brokerage firm in the country.

Based on its extensive experience -- which includes involvement in federal bankruptcy and state receivership proceedings -- MVP proposes that the Commission (1) authorize security interests (including a right of reversion) in a licensee's rights in a broadcast license or (2) if it determines that security interests should not be authorized, at least make it clear that a lender can obtain a security interest in the proceeds of the sale of a station.

The security interest would not confer any ownership right in a broadcast license. Nor would the security interest enable the secured party to acquire a license or exercise control over license without first securing FCC approval. The security interests would merely constitute a decision by the licensee to file an appropriate application with the Commission if and when certain conditions materialize (such as a default on loan payments). In short, the security interest would not be a permanent lien on the license itself; rather, the security interest would attach only to whatever rights the licensee has.

The Communications Act of 1934 ("Act") does not prohibit security interests. The Act does prohibit private

ownership of broadcast licenses. But the Act also creates private interests in a license. These private rights are expressly recognized in the Act, are subject to protection by the Commission and the courts, and can be conveyed through an assignment or transfer. There is nothing in the Act which prohibits the potential conveyance of those rights through a security interest any more than the Act prohibits the licensee from granting an option to a third party which can be exercised in the future.

The licensee's private interest in a license -- and the availability of a security interest -- is confirmed by a recent court decision which allowed the purchaser of three (3) broadcast stations to allocate a certain portion of the purchase price to the FCC licenses themselves and then deduct that amount from the purchaser's taxes. If the licensee's rights in a broadcast license is a private asset which can be deducted from the licensee's tax returns, then those rights should also be subject to a security interest.

Conflicting bankruptcy court decisions require that the Commission also make it clear that a lender can have a security interest in the proceeds from the sale of a station. In the absence of clarification, bankers and other lenders will remain reluctant to advance monies for a broadcast acquisition.

Authorization of security interests (as well as clarification on the security interest in sale proceeds) will do much to restore the financial health of the broadcast industry. Such security interests will provide banks and other lenders with needed assurance that, in the event of a default, their position will be protected. The availability of security interests will probably not undermine the licensee's control or the licensee's ability to conduct its business. Security interests are available in most other non-broadcast businesses, and there is no reason to believe that broadcasters would fare any differently.